

ADJUDICATION

By

LORD DERVAIRD

In dispute between

BILFINGER BERGER CIVIL UK LIMITED, SIEMENS PLC and  
CONSTRUCCIONES Y AUXILIAR DE FERROCARILES S.A. "INFRACO"

Referring Party

and

tie LIMITED  
"tie"

Responding Party

In relation to

Payment of Preliminaries

1. In November 2010 I was appointed by the parties to be the adjudicator in the dispute between them in relation to payment of preliminaries. In accordance with my direction tie provided its response to the notice of referral by Infraco, and Infraco duly made its reply thereto to which tie made answer. An oral hearing was requested on this matter. The initial date proposed 22 December 2010 had to be cancelled by reason of weather and transport problems and in the event it took place on 14 February 2011. A further delay then occurred in that the adjudicator was taken ill on that day and remained in hospital for about a week. These delays are regretted.
2. On 14 May 2008 by contract, as amended by Minute of Variation also dated 14 May 2008 Infraco agreed to carry out the Infraco works and tie was obliged to pay capital expenditure and revenue expenditure as provided for in that contract (hereafter "the Infraco contract"). Infraco Works is defined thus "means, as the context

requires, the EAL Works and all or any of the works to be constructed and completed and/or services to be provided and/or the plant., machinery and equipment to be supplied and installed by the Infraco and which are necessary to deliver the Edinburgh Tram Network and to subsequently maintain it, all in accordance with this Agreement and the Employers' Requirements.”

3. Paragraph 10 of Schedule Part 4 to the Infraco Contract provides that in the event that any dispute between Infraco and tie in connection with or arising from the Infraco Contract is not resolved by the internal dispute resolution procedures referred to in the Infraco Contract, it shall be resolved by adjudication in accordance with paragraphs 14 to 54 of Schedule Part 9 of the Infraco Contract.
4. The present dispute is connected with the carrying out of authorised works as defined under the Edinburgh Tram (Line Two) Act 2006. It concerns the claim by Infraco that it is entitled to be paid sums due as Preliminaries (site and office overheads) on a monthly basis, and it relates to the sums sought by Infraco in respect of Preliminaries for March, April, May, June and July 2010 (Application Numbers 29, 30, 31, 32 and 33).
5. Infraco contends, in brief, that Preliminaries are not a Construction Milestone or a Critical Milestone, but are sums to which Infraco is entitled in accordance with the Infraco Contract. tie contends that Preliminaries are a Construction Milestone, or Critical Milestone, and that prior to entitlement to payment of Preliminaries Infraco must first have obtained a Construction Milestone Completion Certificate or a Critical Milestone Completion Certificate in accordance with Clause 41 of the Infraco Contract. Not having done so, Infraco has no entitlement to payment. The parties are agreed that if tie's contention is correct Infraco is not at present entitled to payment.

6. Clause 66.1 of the Infraco Contract provides inter alia that tie shall pay the Contract Price to the Infraco for the carrying out and completion of the Infraco Works.

Clause 66.2 states: “Any application for payments of sums due in respect of Construction Milestones, Critical Milestones and Tram Milestones and any payment to be made in respect of (any of the above) shall be made in accordance with the procedure set out in Clause 67.” (Payment in Respect of Applications for Milestone Payments).

Clause 66.4 “Until the issue of the Certificate of Service Commencement any application for payments of sums due in respect of Permitted Variations or other costs or expenses which have been expressly approved by tie and/or to which the Infraco is entitled in accordance with this Agreement shall be made in accordance with the procedure set out in Clause 67. (Payment in Respect of Applications for Milestone Payments).

7. Clause 67.1 “The Infraco shall submit each Application for Milestone Payment, and/or an application for payment for any other fees, costs and/or expenses in respect of Permitted Variations or other costs or expenses which have been expressly approved by tie and/or to which the Infraco is entitled in accordance with this Agreement which are being claimed by the Infraco for the previous Reporting Period, to tie’s Representative within 3 Business Days following each Reporting Period End Date....”
8. Clause 67.4 “Each Application for Milestone Payment and/or an application for payment for any other fees, costs and/or expenses in respect of Permitted Variations or other costs or expenses which have been expressly approved by tie and/or to which the Infraco is entitled in accordance with this Agreement shall:

67.4.1 set out the Milestones....progressed in that Reporting Period and the Milestone Payment due in respect of the same.

67.4.2 set out any other agreed adjustments pursuant to a Permitted Variation; and

67.4.3 any other sums due to or from the Infraco under and/or arising out of this Agreement in accordance with its terms (together with reasonable supporting documentation establishing the basis of such sums being claimed).

9. Clause 67.5 “tie shall procure that the tie’s Representative shall.....certify by notice in writing (a “Construction Interim Certificate”) to the Infraco that part of the sum claimed in the application for payment which is approved by tie and give reasons why any part of the sum claimed has not been certified and the value of the sums involved no later than 5 Business Days after the date on which application for payment was received by tie.”
  
10. Clause 67.9 “The Infraco and tie shall acknowledge that:
  - 67.9.1 a maximum of only one Application for Milestone Payment may be made within this Clause 67.9.1 in any Reporting Period.
  - 67.9.2 the amount to be specified for payment in any Construction Interim Certificate in respect of a Milestone shall not exceed the amount specified in Schedule Part 5 (Pricing) in relation to the achievement of the Milestone....to which such Construction Interim Certificate relates.
  
11. In terms of the definitions contained in Schedule Part I Milestone “means a Construction Milestone, a Critical Milestone a Mobilisation Milestone, a Tram Milestone and/or a Tram Maintenance Mobilisation Milestone.”

12. Contract price is defined as the Contract Price made up of the elements shown in Schedule Part 4 (Price) as may be varied from time to time.....Schedule Part 4 provides that the Contract Price comprises capital expenditure and revenue expenditure. Revenue expenditure is not relevant for present purposes. Capital expenditure is defined in Schedule Part 4 as including the Infraco Construction Works Price, which is on a lump sum basis that is fixed until the completion of the Infraco Works and not subject to variation except in accordance with the provisions of the Agreement. The Construction Works Price is stated at £238,607,664 in Appendix A.
13. Schedule Part 4, which relates to Pricing contains on page 27 a series of items designated as Preliminaries for sums of £8,735,461.39; £1,131,799.42, £2,689,179.73; £319,460.04 and £1,432,030.43 and on pages 28-39 a series of other items which include Preliminaries on page 39.
14. Schedule Part 5 which relates to sums payable contains two headings, firstly Mobilisation under which Preliminaries are set out over a 42 month period at fixed sums for each month; and secondly Preliminaries – Siemens which also sets out Preliminaries at fixed sums for each of 42 months, the respective totals being £13,533,248.66 and £2,000,000. At the top of the page there are three items, descriptions I assume of that which is contained in that Schedule Part 5, namely Project – Edinburgh Tram Network” then “Subject Milestone Payment Schedule” and then “Currency GBP”.
15. Construction Milestone is defined as “any milestone.....which has been identified and defined as a construction milestone in of (sic) Schedule Part 5 (Milestone Payment); Schedule Part 5 does not in terms define any matter as a construction milestone, but it does at the top of each page have the three headings mentioned namely Project Edinburgh Tram Network; Subject Milestone Payment

Schedule; Currency GBP. In respect of many of the pages there are items contained therein which clearly relate to work which has to be done, e.g. Install Electric Cables; Install Fibre Optic Cables. It appears obvious that payment would only arise in respect of such matters where the work specified had actually been done and the relevant Construction Milestone completed. Where preliminaries are concerned it is difficult to see what purpose would be served by such procedure. All that such a Construction Milestone could state would be that a certain date had been passed. And the tie Representative would have no basis for issuing a Construction Milestone Completion Certificate other than that that date had passed (see Clause 4.1.3), and no basis for not issuing such a Certificate if that date had passed.

16. In these circumstances it appears clear that Preliminaries, not being identified other than by reference to the passage of time, are simply a time based cost. Schedule Part 5 refers to them solely in respect of the passage of each of the months specified. It follows that the Preliminaries fall due for Payment under Clause 66 and 67 of the Infraco Contract as other costs or expenses to which the Infraco is entitled in accordance with this Agreement.
17. However although Preliminaries are included in each of the applications to which this adjudication relates, no reasonable supporting documentation establishing the basis and amount of the sums claimed by the Referring Party in its Application for Milestone Payment 29, 30, 31, 32 and 33 as costs and expenses has yet been provided to the Respondent to enable it to make a determination as to the sums properly due under these headings.
18. For the foregoing reasons I find and declare as follows:-

1. Preliminaries are not Construction Milestones or Critical Milestones for the purposes of the Infraco Contract.
2. The issue of a Construction Milestone or a Critical Milestone Certificate is not a condition precedent to the Referring Party submitting an application for payment of Preliminaries.
3. Preliminaries fall due for payment pursuant to Clause 66 and 67 as other costs and expenses to which the Referring Party is entitled to payment in accordance with the Infraco Contract.
4. Upon being provided with reasonable supporting documentation by the Referring Party, the Responding Party shall certify payment as appropriate in respect of Preliminaries in Construction Interim Certificates Numbers 29, 30, 31, 32 and 33.
5. In light of the documentation provided by the Referring Party under 4 (*supra*) the Responding Party shall amend to the extent appropriate Construction Interim Certificates Numbers 29, 30, 31, 32 and 33.
6. The Referring Party shall be liable for the fees and expenses of the Adjudicator to the extent of 25% and the Responding Party to the extent of 75%.

Lord Dervaird  
Adjudicator